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No. 254

IN THE

Supreme Court of the United States

ARGONAUT SAVINGS AND LOAN ASSOCIATION, a Corporation; and CITY SAVINGS AND LOAN ASSOCIATION, a Corporation,

Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION As Receiver of SAN FRANCISCO NATIONAL BANK,

Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ARGONAUT SAVINGS AND LOAN ASSOCIATION, a Corporation; and CITY SAVINGS AND LOAN ASSOCIATION, a Corporation,

Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION As Receiver of SAN FRANCISCO NATIONAL BANK,

Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARGONAUT SAVINGS AND LOAN ASSOCIATION and CITY SAVINGS AND LOAN ASSOCIATION pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in their proceedings No. 21364 on April 3, 1968 affirming the judgment of the United States District Court, Northern District of California, upon a motion for summary judgment, dismissing the complaint with prejudice, dated July 11, 1966.

OPINION

The opinion of the Court of Appeals, Ninth Circuit, is reported at 392 Fed.2d. 195.

JURISDICTION

Jurisdiction of this court is invoked under 28 USCA 1254 (1); involving a judgment of the United States Court of Appeals made April 3, 1968; a petition for rehearing was filed May 2, 1968 and denied May 14, 1968. Federal Court jurisdiction was based upon the defendant Federal Deposit Insurance Corporation being a party, under 28 USCA 1331 as provided by 12 USCA 1819.

QUESTIONS FOR REVIEW

1) May the District Court grant a summary judgment dismissing the action when there are facts stated in the affidavit in support of the complaint showing the plaintiff entitled to recover against the defendant?

2) May the statutory receiver of an insolvent national bank dispose of assets of the bank, its leasehold improvements, without consideration, and without consent of the District Court?

3) Is insolvency of a national bank lessee, requiring the Comptroller of the Currency to close it and appoint a statutory receiver, an anticipatory breach of the lease?

4) Is repudiation of a lease with a liquidated damage clause (in California where CC 3308 permits the parties to the lease to agree to such measure of damages) give rise to a valid and enforceable claim in the liquidation of a national bank by a statutory receivership?

FACTS

A complaint was filed in the United States District Court by the plaintiffs and appellants ARGONAUT SAVINGS AND LOAN ASSOCIATION and CITY SAVINGS AND LOAN ASSOCIATION against the FEDERAL DEPOSIT INSURANCE CORPORATION as receiver of San Francisco National Bank setting forth that on July 12, 1963, a lease was made to certain real property at 220 Battery Street, San Francisco, to run for a term of twenty-five years, to the San Francisco National Bank as lessee. The entire lease is attached as an exhibit to the complaint (R-4-21). The lessor assigned the lease to the plaintiffs as further security for a loan, and the assignment is attached to the complaint as an exhibit (R-22-4). The lessee bank is a party to this assignment and subordination agreement, and therefore there is notice to the assignee binding the bank upon this assignment.

On January 22, 1965, the bank had its doors closed by the Comptroller of Currency, and a liquidator was appointed and the FEDERAL DEPOSIT INSURANCE CORPORATION was appointed receiver of the San Francisco National Bank by the Comptroller of Currency (R-28-31).

On June 28, 1965, the defendant FEDERAL DEPOSIT INSURANCE CORPORATION renounced and repudiated this lease (R-32) and paid one month's rent, the calendar month of July 1965, by the $3,000 check to the plaintiffs, and surrendered possession on July 31, 1965.

No rents were paid by the bank to the assignee plaintiffs nor were any payments made by the assignor on or after December 1, 1964, until after the bank was closed on January 22, 1965. FEDERAL DEPOSIT INSURANCE CORPORATION commenced paying rent

on February 1 and continued paying through July when it abandoned the premises. No rent was paid from December 1 through January (R-42 and Exhibit following affidavit).

The lease (R-14-5) contains a liquidated damage clause.

> "(c) To terminate this lease, in which event lessee agrees immediately to surrender possession of the premises and to pay to lessor as the amount of damage sustained by lessor by reason of lessee's breach of this lease (Lessee agreeing that it would be impractical or extremely difficult to fix the actual damages) a sum of money equal to the amount, if any, by which the then cash rental value of the rent reserved hereunder for the balance of the term of this lease exceeds the then cash reasonable rental value of the premises for the balance of the term at the time of such termination, the claim for which sum shall be immediately enforceable by the lessor against lessee by suit, and shall be proveable in any proceedings for the liquidation or reorganization of the lessee."

Under this provision of the lease, the plaintiffs sought by way of liquidated damages $610,000.00 and by item 23 of the lease (R-17), attorney's fees in this action for liquidated damages for breach of the lease.

Upon the defendant's motion for summary judgment, defendant was granted summary judgment and the cause was dismissed with prejudice (R-44), and the matter duly appealed (R-45).

ARGUMENT

I

Nature of the Statutory National Bank Receivership, As Distinguished from a Judicial Receivership

A national bank is insolvent when it is unable to meet its obligations as they mature, and not by the usual test of assets not equaling obligations.

Smith v. Witherow, 102 Fed.2d 638.

A statutory "receiver" appointed by the Comptroller of Currency for an insolvent national bank is a statutory officer, with duty to realize on the assets of the closed bank and to pay creditors. It is not an equity receiver.

Cooper v. O'Connor, (App. Dist. Col.) 107 Fed.2d 207.

Cooper v. O'Connor, 105 Fed.2d 761.

And the receiver can sell assets only when he is authorized to do so by a court of competent jurisdiction.

Mitchell v. Joseph, 7 Cir., 117 Fed.2d 253.

This statutory receiver is an agent of the Comptroller, not the court, with limited authority. All who deal with him are charged with knowledge of the limitation of his authority.

Oosterhuis v. Palmer, 2 Cir., 137 Fed.2d 322, 153 A.L.R. 475.

And the receiver's power to sell depends upon approval of sale by the court of competent jurisdiction.

Roth v. Hood, 6 Cir., 106 Fed.2d 616.

The insolvency of a national bank, and the appointment of a receiver does not work dissolution of the authority of the bank corporation to make transactions, not forbidden.

Hiatt v. Warren, 5 Cir., 44 Fed.2d 313.

Hayes v. Wilkinson, 10 Cir., 72 Fed.2d 201.

The statutory "receiver" does not have authority to dispose of property of the insolvent bank other than by sale.

Jackson v. McIntosh, 5 Cir., 12 Fed.2d 676.

There has been no direct adjudication in which an appellate court has determined whether the statutory "receiver" appointed by the Comptroller of Currency to liquidate an insolvent national bank can reaffirm leases, or other executory contracts. There are appellate court decisions that pass upon collateral matters, but do not discuss this authority.

It has been not only determined by the *Jackson* case (12 Fed.2d 676) that this "receiver" does not have authority to dispose of property other than by sale, but it has also been directly held that such a "receiver" is bound by the valid contracts of the bank subsisting at the time of his appointment, and that he has no power to impair the obligation of a valid contract so far as the parties are concerned.

Kaercher v. Citizens Nat. Bk., 8 Cir., 57 Fed.2d 58.

The *Kaercher* case (57 Fed.2d 58) involved an action for breach of a contract, made by a national bank when the plaintiff gave a note in which it was an accommodation maker, and in which contract it was agreed that the bank would not transfer or sell or bring any suit upon the note. Upon the insolvency of the bank, the "receiver" appointed by the Comptroller brought suit upon the notes, and judgment was rendered for the maker of the note. Thereupon the maker of the note sued for $2,050.00 attorney's fees occasioned by the

breach of the bank's contract. The Eighth Circuit held that a receiver stands in no better position than the bank, and that he had breached this contract, and that he could not impair by his acts any valid contract subsisting at the time of his appointment. He has no power to impair the obligation of a valid contract as far as the parties are concerned.

B. Court Receiver. Receivership is an equity ancillary remedy. It is an incident to, and an aid of equity jurisdiction. Its object is to secure and preserve property in controversy, pending litigation so it may be subjected to the order or decree of the court as may be rendered.

53 C.J. 19, Receivers 3.

It is ancillary and provisional in character and not the final relief nor the object of the litigation. It is merely ancillary to the equitable relief in the principal action or final or ultimate relief.

53 C.J. 22, Receivers 5.

A receiver is an officer of the court, and the property is in the custody of the court. It is a duty of the receiver to protect the property for the court. It is therefore grown up in the law of receivers that a receiver is generally given the right to adopt or reject executory contracts made prior to his appointment, and this power is subject to the control of the court. If the receiver, with permission of the court appointing him elects to perform a contract, he is bound by the contract, and he takes the contract cum onere and all of the obligations in connection therewith are obligations of the receiver incurred in his receivership, and are a preferred charge on the assets in his hands. It is generally stated that a receiver is not required to assume the performance of

executory contracts, as they can be a burden upon the assets in the hand of the court being held and preserved for the outcome of the litigation.

C. Statutory "Receiver". This practice or rule would have no application to a statutory "receiver" appointed by a Comptroller of Currency for the insolvent national bank, whose sole duty is to take possession of the property of the insolvent bank, sell it, and liquidate for the benefit of the creditors, and distribute it to these bank creditors.

A "statutory" receiver for an insolvent bank has the duty to liquidate all assets of the bank. It has the duty to distribute the proceeds of all creditors of the bank.

Let us assume a situation where a bank has $4,500,000 capital and surplus of a total of approximately $50 million assets of which approximately 1.5 million is in physical assets almost all of which is in leasehold improvements on long term leases for its home office and two branches. Its main office is unfortunately on two leaseholds, one on the corner and one adjoining the corner. The leasehold improvements have changed the corner parcel into the bank proper and the adjoining leasehold is converted at a couple of hundred thousand dollars into the "operations room" for the bookkeeping, the basement into toilet facilities for the entire unit. An employee's cafeteria is built in the basement of the adjoining leasehold. Offices are placed in the second floor above the operations room. As the two leaseholds have utility and value as premises for a financial institution, whether one the FDIC is charged by law to open to keep competition in the area or to sell the leaseholds with improvements because it represents a third of the capital and surplus of the bank. To repudiate the leases is to make the corner leasehold of little or no value for

want of its adjoining parcel into which it has been integrated as a unit. The adjoining parcel under a separate leasehold would be even less valuable for it is no longer usable except with the corner, without extensive alterations. A repudiation of this lease is certain to result in great damages, and not only is the value of the leasehold improvements lost but additional liabilities are incurred. The statutory "receiver" should not be permitted to lose this asset.

It may well be that such a statutory "receiver" would want to justify the actions of closing a bank which had not to the date of closing defaulted on any obligation nor failed to meet its obligations as they were presented, by losing a third of the assets above the obligations shown in the bank's statement and even in the audit made as of date of closing, so that statutory receiver can justify a 20-year project for liquidation. Should the statutory "receiver" repudiate the contract, it would create a liability for breach of a valid contract.

In such a situation, it would be neither fair nor equitable for the statutory "receiver" to lose such extensive assets of the bank, nor is he authorized by the statutes to do so. A valid contract and lease in effect at the time the "receiver" is appointed, remains in effect; and if there is a breach, either before or after the appointment, the bank and its property is liable for this breach.

The statutory "receiver" has a duty to liquidate all assets, and not breach leases and lose nearly $1.5 million of leasehold improvements. Leases, as executory contracts, are valid and binding. They should not be breached and if breached they are compensable in damages. Insolvency breached the lease as it does other executory contracts, and the liquidated damages therefor are proveable claims and debts to be paid along with

the other obligations of the bank. Whether the bank be in fact, insolvent, or not, in any event, the repudiation of the lease would give rise to the claim for liquidated damages in the lease.

II

Insolvency Is an Anticipatory Breach.

Executory contracts are breached by insolvency or bankruptcy of a promiser to the contract. There is an implied promise in all contracts not to become insolvent or bankrupt and thus disable oneself from peforming the contract.

Central Trust Co. v. Chicago Auditorium Theatre, (1915) 240 U.S. 581, 60 L. Ed. 811.

Anticipatory breaches are recognized under California law.

Caminetti v. Manierre, 23 Cal.2d 94, 142 Pac.2d 741.

Whether or not the statutory receiver repudiated the lease after the occurrence of the insolvency, or not, the insolvency is an anticipatory breach, giving rise to a cause of action under the liquidated damages provisions of the lease.

III

Repudiation of a Lease with a Liquidated Damages Clause Gives Rise to a Valid and Enforceable Claim.

A lease with a liquidated damages clause, disaffirmed by a judicial receiver, is a proveable claim.

Gardner v. Butler & Co., (1917) 245 U.S. 603, 38 S. Ct. 214.

Wm. Filene's Sons Co. v. Weed, (1917) 245 U.S. 597, 38 S. Ct. 211.

The rule is otherwise if there is no liquidated damages clause, for on termination of the lease there is no further claim of the landlord, at common law.

Gardner v. Butler & Co., 245 U.S. 603.

A claim for damages or rentals under a valid lease accruing after the appointment of a judicial receivership is proveable in the receivership as a claim, if it is liquidated (made certain) before distribution of assets to the creditors, by judgment for damages.

Dickinson v. Universal Service Stations, 9 Cir., 100 Fed.2d 753.

After the decision of *Manhattan Prop. v. Irving F. Co.*, 290 U.S. 230, the predicament of landlords whose leases are disaffirmed in bankruptcy by the trustee was brought to the attention of Congress who amended the bankruptcy law and the landlord's claim is now proveable in bankruptcy by express statute.

City Bank Co. v. Irving F. Co., (1936) 299 U.S. 433.

This case does not involve bankruptcy nor the Bankruptcy Act. It does not involve a court receivership. It does involve a lease with a liquidated damages clause. It involves insolvency of the lessee. It is a clear case of anticipatory breach of the lease by the lessee. It is doubly reinforced by a clear repudiation of the lease by the lessee's statutory "receiver", soon after insolvency was made public by the closing of the bank by the Comptroller of the Currency.

In any event the lease was valid and enforceable and rent fell due to the assignee of the lease, and this rent was not paid and is still unpaid.

The lease was breached by the lessee's insolvency and thereafter by the statutory "receiver's" repudiation and abandonment of the premises. Under the liquidated

damages provisions of the lease it is a valid claim, and enforceable as such, against the bank and its assets (C.C. 3308).

If only debts matured and due at the time of the bank's closing are proveable debts, we should observe all savings accounts and time deposits are payable by force of the bank's by-laws only after thirty (30) days written notice and then only to the extent it does not affect the bank's liquidity (no loans to be made in the meantime). Certificates of deposit are not due until their maturity date appearing on the certificate. Obviously all obligations of the bank and all claims for breach of contract are to be paid from the bank's assets, regardless of their due date.

Where as here, there is a liquidated damages clause in the lease, there is first insolvency of the lease and, secondly, lessee's statutory receiver repudiated the lease and abandoned the premises, the lessor's assignors may recover damages for the breach forthwith.

IV

The Ninth Circuit Decision in This Case Follows and Cites a First Circuit Decision in Which Certiorari was Granted by This Court.

The lower court decision for which certiorari is requested cites, follows and turns upon *Kennedy v. Boston-Continental Nat'l. Bk.* (1 Cir., '36) 84 Fed.2d 592 (Cert. granted 299 U.S. 533, case dismissed on motion of plaintiff 300 U.S. 533) holding that in Massachusetts, a national bank's insolvent estate was not liable for damages where the statutory receiver notified the lessor of the election not to assume the lease after the bank was closed. This decision contains a very able dissent by Justice Morton pointing out that the allowance of a claim depends upon whether the equitable or bankruptcy rule be followed, the equitable rule being

the *Filene* case (245 U.S. 597) and bankruptcy rule, the *Manhattan Prop. v. Irving Trust* case (290 U.S. 320); and the National Bank Act provides for a complete statutory system for liquidation of insolvent banks and the administration is on equitable principles.

The bankruptcy rule has been changed by statute since the *Manhattan* case (290 U.S. 320) because of the harshness of that rule. A contrary rule to that of the *Kennedy* case (84 Fed.2d 592, cert. granted 299 U.S. 533) prevailed in other circuits as for example *First National Bank of Chicago v. First National Bank of Wheaton* (7 Cir., '35) 78 Fed.2d 502 where there is an excellent discussion of the law and the anticipatory breach doctrine and equitable rule were applied. See also *Leo v. Pearce Stores* (DC-Mich. '32) 54 Fed.2d 92 discussing *in re Mullings Clothes* (2 Cir., '16) 238 F. 58, and *Penn. Steel Co. v. N.Y. City Ry. Co.* (2 Cir. '12) 198 F. 721.

Certiorari was granted in *Kennedy v. Boston-Cont. Nat'l. Bk.* case (supra) at *299 U.S. 533* and the case was dismissed on the motion of the plaintiff in *300 U.S. 684*, thus denying us the benefit of a decision of this Court on this important question.

Where certiorari is granted by this court, it shows that there is sufficient grounds to grant it in this case involving the same question of law. In addition, we have the added questions of the state statute granting such a right to conract for liquidated damages in leases, and we have the question of a statutory receiver's power to dispose of leasehold property without consent of any court, when consent is required for a sale of compromise of a claim.

V

Summary Judgment Can Not Be Granted Where the Affidavit of the Plaintiff Shows a Right to Recover.

The above action was one for monetary judgment, and the facts appear *without issue* that no rent of any kind was paid for December nor for January. The bank was closed January 22. No rent was paid for the possession of the statutory receiver for any part of January. Rental payments started for February and continued through July when the premises were abandoned. The plaintiff is thus entitled to judgment for the two months' rental of $3,000 a month, a total of $6,000 plus attorney's fees and interest. The trial court erroneously granted summary judgment dismissing the complaint and entered judgment for the defendant in face of these facts.

Where facts in affidavits upon motion for summary judgment justify an amendment, such amendment should not be prevented by a final judgment.

Rossiter v. Vogel, 2 Cir., 143 Fed.2d 908.
6 Moore's Fed. Prac. 2127.

And it may be treated as though the pleadings were amended to conform to the facts set forth in the affiidavits.

Seaboard Term. Corp. v. Standard Oil Co., 2 Cir., 104 Fed.2d 659.

Here there was no issue of fact, and not a mere conflict which will prevent a summary judgment. The summary judgment could have been entered for the plaintiff, certainly not against it.

CONCLUSIONS

This petition sets forth and raises several very important and urgent questions that should be resolved by this Court.

Justice demands that a writ issue and be granted and that these matters be adjudicated by this court.

HOWARD B. CRITTENDEN, JR.
Attorney for Plaintiffs and Petitioners

Appendix Follows

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARGONAUT SAVINGS & LOAN ASSOCIATION, ETC.,
Appellant,

vs.

FEDERAL DEPOSIT INSURANCE CORP.,
Appellee.

No. 21,364

[April 3, 1968]

Appeal from the United States District Court
for the Northern District of California

Before: MADDEN, Judge, Court of Claims, JERTBERG and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

This is an action by the assignees of a lessor of real property against the Federal Deposit Insurance Corporation (FDIC) as receiver of the lessee, San Francisco National Bank. The District Court entered a summary judgment for the FDIC. We affirm.

The lease was made on July 12, 1963, and calls for rent at $3,000 per month, plus taxes and insurance. On January 22, 1965, the Comptroller of the Currency ordered the Bank closed as insolvent and appointed FDIC receiver. On June 28, 1965, FDIC gave written notice of disaffirmance of the lease, effective July 31, 1965. It paid the rent for the months of February through July, 1965. On December 14, 1965, the present action was filed.

A copy of the lease is attached to the complaint. It provides that, upon the appointment of a receiver for the lessee Bank, the lessor has the following options:

(a) To sue for and collect each installment of rent or other money as it becomes due, or

(b) To re-enter, oust the tenant and relet for the latter's account, the tenant to continue liable, month by month, for deficiencies in rent, or

(c) To terminate the lease, in which event the tenant is to become liable for the difference between the then value of the rent reserved for the balance of the term and the then cash reasonable rental value of the premises for the same period.

The lease also provides for the payment of lessor's attorney fees in the event of successful prosecution of a suit to enforce any provision of the lease.

In the complaint, it is stated that the appellants, "by this Complaint, . . . hereby formally notify the defendant . . . of the termination of the lease as of the date Defendant abandoned the premises [stated elsewhere in the complaint to be July 31, 1965], and hereby make formal claim on the Defendant for the agreed sum of damages [under option (c), above], which Plaintiffs allege to be Six Hundred Ten Thousand Dollars . . . ."

The law of California permits the parties to a lease to agree upon the measure of damages for breach that is here asserted. (Cal.Civ.Code § 3308). But that does not necessarily mean that, under such a lease, the lessor's claim is good against the receiver of an insolvent lessee national bank. This is an action under the National Bank Act, and particularly Section 194 of Title 12, U.S.C., formerly R.S. 5236. The District Court is a court of competent jurisdiction under that section. See 12 U.S.C. § 1819, 28 U.S.C. § 1331. And the question presented is governed by federal law, here, section 194 of 12 U.S.C. *American Surety Co. v. Bethlehem Nat'l Bank,* 1941, 314 U.S. 314, 316.

The paucity of decisions dealing with claims against receivers of insolvent national banks since the great banking crisis of the 1930's is some indication of the success of the measures that were then taken, including the creation of FDIC, itself, to strengthen the banking system. But section 194 has not been amended, and there exists direct authority in support of the judgment here. In *Kennedy v. Boston-Continental Nat'l Bank,* 1 Cir., 1936, 84 F.2d 592, the facts were strikingly similar to the facts of this case, and it was held that the lessor was not entitled to judgment because his claim had not accrued and become unconditionally fixed on or

before the date when the bank was declared insolvent. That is equally true here. The bank was declared insolvent on January 22, 1965; the appellants did nothing to exercise the option given them by the lease until December 14, 1965, nearly 11 months later. The appellants did not have, on January 22, 1965, the claim that they now assert. We think the reasoning in *Kennedy,* and the authorities there cited, fully support the judgment here. See also *Boston-Continental Nat'l Bank v. Wendell Phillips Co.,* 1 Cir., 1936, 84 F.2d 599; *Dinan v. First Nat'l Bank of Detroit,* 6 Cir., 1941, 117 F.2d 459, 461-62.

We do not overlook the argument of appellants that the receiver has no power to disaffirm the lease. But we reject it. There was disaffirmance in *Kennedy, supra,* in *Wendell Phillips Co., supra,* and in *Dinan, supra.* See also *Buhl Land Co. v. Kavanagh.* E.D. Mich. 1954, 131 F. Supp. 136, 143, *aff'd.* 6 Cir., 1955, 223 F.2d 265; *Fidelity Safe Deposit & Trust Co. v. Armstrong,* C.C.S.D. Ohio, 1888, 35 Fed. 567, 569.

AFFIRMED.

Appendix

COMPLAINT ON LEASE

1. This action is deemed to arise under the laws of the United States as contemplated by U.S.C. Title 28 § 1331 in respect to the above-named defendant's being a party hereto, as provided by the Federal Deposit Insurance Act of September 21, 1950, 64 Stat. 873, U.S.C. Title 12 § 1819. The amount in controversy exceeds $10,000, as will more fully appear.

2. On July 12, 1963, one DON C. SILVERTHORNE, as lessor, contracted with and delivered to THE SAN FRANCISCO NATIONAL BANK, as lessee, a certain leasehold at 220 Battery Street, San Francisco, California, for a twenty-five (25) year term to run from August 1, 1963. A copy of such lease is attached hereto as Exhibit A. On July 12, 1963, the aforesaid lessor fully assigned his rights as lessor under the lease to Plaintiffs herein with the full consent and cooperation of the aforesaid lessee. A copy of this Assignment is attached hereto as Exhibit B. For some time prior to June 28, 1965, and ever since, the SAN FRANCISCO NATIONAL BANK has been in receivership, and the defendant has been receiver.

3. On July 31, 1965, the defendant formally disaffirmed the said lease and wrongfully removed from the leasehold premises and ever since has left them vacant and from that date has paid no rental nor performed any other of the obligations of the lessee under the lease although Plaintiff has continually requested that it resume its obligations.

4. Under Item 15 (c) of the lease upon any such default as above-described of the lessee, the lessor is given the option to declare the lease terminated and make demand for, and the lessee is obligated to pay,

by way of liquidated damages, a sum of money, the method of calculation for which is contained under said Item, and the claim for which sum is to be immediately enforceable by suit. By Item 23 the lessor is entitled to request and be awarded a reasonable attorney's fee incurred in prosecution of such a suit. By this Complaint, the Plaintiffs as lessor hereby formally notify the defendant as lessee of the termination of the lease as of the date Defendant abandoned the premises, and hereby make formal claim on the Defendant for the agreed sum of damages, which Plaintiffs allege to be Six Hundred Ten Thousand Dollars ($610,000.00).

5. WHEREFORE, Plaintiffs pray for judgment against Defendant in the sum of Six Hundred Ten Thousand Dollars ($610,000.00), for cost of suit, for reasonable attorneys' fees, and for such other and further relief as the Court may find proper.
DATED: December 9, 1965.

Payne and Levy

By: /s/ Silas O. Payne
Husted, Pinney, Smith & Ogg

LEASE

THIS LEASE, executed in duplicate counterparts on this 12th day of July, 1963, by and between DON C. SILVERTHORNE, as Lessor, and SAN FRANCISCO NATIONAL BANK, a corporation, as Lessee.

3. BASIC RENTAL. The Lessee shall pay as basic rental for the leased premises the sum of Three Thousand Dollars ($3,000.00) per month for each and every

calendar month during the first five (5) years of the term hereof, the sum of Thirty-Five Hundred Dollars ($3,500.00) per month for each and every calendar month during the next five (5) years of the term hereof, and the sum of Four Thousand Dollars ($4,000.00) per month for the final fifteen (15) years of said term, payable monthly in advance.

6. USE OF LEASED PREMISES. The leased premises shall be used by Lessee for the purpose of carrying on a *general banking, trust and safe deposit business,* and for no other purpose without Lessor's prior consent thereto in writing.

15. DEFAULT AND REMEDIES. If default shall be made by Lessee in the payment when due of any rental or other moneys due hereunder and such default shall continue for ten (10) days after the due date for such payment; or if Lessee shall otherwise be in default in the performance of any of the terms, covenants or conditions herein contained and such default shall continue after the expiration of thirty (30) days following delivery to Lessee by Lessor of written notice to cure such default; or if Lessee's interest herein or any part threof be assigned or transferred, either voluntarily or by operation of law, without permission of Lessor when such permission is required by the term of this lease, whether by judgment, execution, death or any other means, or if Lessee shall file any petition or institute any proceedings under any bankruptcy act, state or federal, or if any such petition or proceeding be filed or be instituted or taken against Lessee; or if any receiver of the business or of the property or assets of Lessee shall be appointed by any court, except a receiver appointed at the instance or request of Lessor; or if Lessee shall make a general or any assignment for the benefit

of its creditors; or if Lessee shall abandon or vacate the premises; or if Lessee shall otherwise, in any amount whatever, become unable to pay the rent herein specified or to perform any of the terms, covenants, or conditions herein by it to be kept or performed, then in any of such events Lessor shall have the option either:

(c) To terminate this lease, in which event Lessee agrees immediately to surrender possession of the premises and to pay to Lessor as the amount of damage sustained by Lessor by reason of Lessee's breach of this lease (Lessee agreeing that it would be impractical or extremely difficult to fix the actual damage) a sum of money equal to the amount, if any, by which the then cash rental value of the rent reserved hereunder for the balance of the term of this lease exceeds the then cash reasonable rental value of the premises for the balance of the term at the time of such termination, the claim for which sum shall be immediately enforceable by Lessor against Lessee by suit, and shall be proveable in any proceedings for the liquidation or reorganization of Lessee.

The foregoing remedies of Lessor shall not be exclusive, but shall be cumulative and in addition to all remedies now or hereafter allowed by law or elsewhere provided for.

AFFIDAVIT

STATE OF CALIFORNIA)
CITY AND COUNTY OF) ss.
SAN FRANCISCO)

SILAS O. PAYNE, being first duly sworn, deposes and says:

That he is an attorney-at-law with offices at 650 California Street, San Francisco, California.

That the Plaintiffs did not receive any loan payments from the said DON C. SILVERTHORNE or from the said SAN FRANCISCO NATIONAL BANK on or after December 1, 1964 and the undersigned therefore states on information and belief that the said SAN FRANCISCO NATIONAL BANK did not pay the rent payments due December 1, 1964 and subsequently falling due.

That the Plaintiffs received no payments from any source on or after December 1, 1964 except as follows: The Defendant made payments of ONE THOUSAND FIVE HUNDRED AND NO/100 ($1,500.00) DOLLARS each to the Plaintiffs on the dates indicated: March 2, 1965; March 9, 1965; April 5, 1965; April 30, 1965; June 2, 1965 and June 30, 1965.

That the payment record is attached hereto and made a part hereof.

/s/ SILAS O. PAYNE

Subscribed and sworn to before me
this 20th day of May, 1966.
/s/ ELAINE P. THUESEN
Notary Public

JUDGMENT

A motion by the defendant above named for summary judgment in its favor dismissing the complaint, the action and the cause, having been duly brought on to be heard, and the court having made its findings of fact and its conclusions of law granting said motion and directing that judgment be entered herein in favor of defendant dismissing the action it is hereby

ORDERED, ADJUDGED AND DECREED that defendant have judgment in its favor herein, and that the complaint, the action and the cause herein be and the same hereby are dismissed with prejudice.

Dated: July 11, 1966.

/s/ WM. C. MATHES
Senior U.S. District Judge

CALIFORNIA CIVIL CODE SEC. 3308

The parties to any lease of real or personal property may agree therein that if such lease shall be terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee the worth at the time of such termination, or the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term or any shorter period of time over the then reasonable rental value of the premises for the same period.

The rights of the lessor under such agreement shall be cumulative to all other rights or remedies now or hereafter given to the lessor by law or by the terms of the lease; provided, however, that the election of the lessor to exercise the remedy hereinabove permitted shall be binding upon him and exclude recourse there-

after to any other remedy for rent or charges equivalent to rental or damages for breach of the covenant to pay such rent or charges accruing subsequent to the time of such termination. The parties to such lease may further agree therein that unless the remedy provided by this section is exercised by the lessor within a specified time the right thereto shall be barred. (Stat. 1937, p. 1494)

SUPREME COURT, U. S.

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JUL 26 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 254

ARGONAUT SAVINGS AND LOAN ASSOCIATION, a corporation, and CITY SAVINGS AND LOAN ASSOCIATION, a corporation,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of San Francisco National Bank,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari

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San Francisco, California 94111

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Washington, D. C. 20429

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FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of San Francisco National Bank,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari

PRELIMINARY STATEMENT

This is the brief of respondent Federal Deposit Insurance Corporation, as receiver of San Francisco National Bank,[1] in opposition to the petition for a writ of certiorari.

This case concerns the construction of a written lease. SFNB was the lessee. Petitioners hold the lessor's interest.

1. In this brief San Francisco National Bank will be called "SFNB" or "the bank," and Federal Deposit Insurance Corporation in its capacity as receiver of SFNB will simply be called "FDIC."

Aproximately eighteen months after the lease was made, SFNB was declared insolvent and closed by the Comptroller of the Currency. FDIC was appointed SFNB's receiver. After being appointed receiver, FDIC continued to occupy the leased premises and paid the rental for approximately six months. FDIC then exercised its right as receiver to disaffirm the lease. Five months later, petitioners declared the lease terminated and sued FDIC for the unexpired term of the lease.

The District Court granted FDIC's motion for summary judgment. The Court of Appeals affirmed. Both courts held that under the language of the lease FDIC was as a matter of law not liable for the unexpired term of the lease.

That decision does not call for the attention of this Court. It is simply a matter of the interpretation of the lease. The decision is consistent with several cases reaching the same result. And the decision is consistent with the intent of Congress. The holding is both legally correct and equitable.

In this brief, we will show that the decision is consistent with other cases, with the intent of Congress, and with equity. We will answer petitioners' arguments, and will show that they do not present any issue to be decided by this Court.

The basic point is this: this case simply involves the interpretation of a lease, and the lower courts' interpretation is consistent with present law and is correct.

STATEMENT OF FACTS

Because we believe that petitioners' statement of facts is defective, we respectfully submit respondent's statement. The facts appear in the complaint and in the affidavit of Mr. Melville B. Bennett.[2]

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2. Tr., page 1, page 28.

In 1963 Mr. Don C. Silverthorne, SFNB's president, leased certain premises[3] to the bank under a written lease for twenty-five years. On the same day, Silverthorne assigned his rights as lessor to petitioners. On January 22, 1965, SFNB was closed for insolvency by the Comptroller of the Currency and FDIC was appointed the bank's receiver.[4] On June 28, 1965, FDIC notified petitioners that it was disaffirming the lease effective July 31, 1965, and on the designated date FDIC relinquished possession of the premises to petitioners.

Petitioners' complaint was filed approximately five months later. The complaint included a notification by petitioners that under the options given to them in paragraph 15(c) of the lease, they were electing to terminate the lease. Petitioners asked for damages for the unexpired term of the lease.

THE DISTRICT COURT AND COURT OF APPEALS HELD THAT FDIC WAS NOT LIABLE FOR THE UNEXPIRED TERM OF THE LEASE

Petitioners make several erroneous statements about what they contend are the issues in the case. It is therefore important to note precisely what the lower courts decided.

They held that under the language of the lease FDIC was as a matter of law not liable for the unexpired term of the lease. The Court of Appeals' opinion expressly referred to the language of the lease. It then said that under the language of that lease:

> ". . . the lessor was not entitled to judgment because his claim had not accrued and become unconditionally fixed on or before the date when the bank was declared

3. Not the main bank office.

4. FDIC must be the receiver for all closed national banks, 12 U.S.C. § 1821(c).

> insolvent . . . . The bank was declared insolvent on January 22, 1965; the appellants did nothing to exercise the option given them by the lease until December 14, 1965, nearly eleven months later. The appellants did not have, on January 22, 1965, the claim that they now assert."

Therefore, petitioner's claim for the unexpired term of the lease was not a valid claim against the bank's receiver; 12 USC § 194.

The decision of the lower court is simple: under the language of the lease, FDIC is not liable for the unexpired term of the lease. This was the only thing decided. And it was correct.

THE DECISION IS LEGALLY CORRECT AND IS EQUITABLE

The Decision is Consistent with Other Cases.

The decision of the District Court and the Court of Appeals is consistent with cases previously decided.

Innumerable cases hold that for a claim to be enforceable against an insolvent national bank receivership, it must be accrued and unconditionally fixed on or before the date the bank becomes insolvent.[5] And more specifically, two cases are precisely in point with the present case. They

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5. *First Nat. Bank of Selma v. Colby*, 88 U.S. 609, 612-614 (1875); *Scott v. Armstrong*, 146 U.S. 499, 511 (1892); *Davis v. Elmira Savings Bank*, 161 U.S. 275, 289-290 (1896); *Dakin v. Bayly*, 290 U.S. 143, 148-149 (1933); *Merchants' Nat. Bank v. School Dist. No. 8*, 94 Fed. 705, 709 (9th Cir. 1899); *Citizens' Bank & Trust Co. v. Thornton, et al.*, 174 Fed. 752, 762-763 (5th Cir. 1909); *Steele v. Randall*, 19 F.2d 40 (8th Cir. 1927); *Fouts v. Maryland Casualty Co.*, 30 F.2d 357 (4th Cir. 1929), cert. den., 279 U.S. 852 (1929); *Gamble v. Wimberly*, 44 F.2d 329, 332-333 (4th Cir. 1930); *Douglass v. Thurston County*, 86 F.2d 899, 909-910 (9th Cir. 1936); *Fash v. First Nat. Bank of Alva*, 89 F.2d 110 (10th Cir. 1937); and *Dinan v. First Nat. Bank of Detroit*, 117 F.2d 459, 461-462 (6th Cir. 1941), cert. granted, 314 U.S. 593 (1941); cert. dismissed 315 U.S. 824 (1942).

are *Kennedy v. Boston-Continental National Bank*, 84 F.2d 592 (1st Cir. 1936), and *Boston-Continental National Bank v. Wendell Phillips Co.*, 84 F.2d 599 (1st Cir. 1936). The identity of the two *Boston-Continental* cases to the present case was noted in the Court of Appeals' opinion. We will not here repeat the facts or opinions of the two cases. However, their identity to the present case is easily demonstrated. In each case:

(1) There was a lease to a national bank which became insolvent and went into receivership;

(2) The lease was thereafter disaffirmed by the bank's receiver and was then terminated by the lessor;

(3) The claimed damages were for the unexpired term of the lease;

(4) The claim was based on a clause in the lease which provided for liquidated damages in the event of termination of the lease by the lessor for breach by the lessee; and

(5) The court held that the receiver was not liable to the lessor for the unexpired term of the lease.

The Decision Is Consistent With the Intent of Congress.

Congress has indicated its approval of the *Boston-Continental* holdings in favor of national bank receivers.

Congress amended the *bankruptcy* statute regarding the liability of a *bankrupt's* receiver for the unexpired portion of the *bankrupt's* lease; 11 USC § 103. However, Congress made no similar amendment to the National Bank Act regarding *national bank* leases.[6] Congress thereby expressed

6. National banks and their receiverships are not subject to the provisions of the Bankruptcy Act. They are regulated under the separate statutory system of the National Bank Act; *Cook County National Bank v. United States*, 107 U.S. 445 (1882); *Hulse v. Argetsinger*, 18 F.2d 944 (2nd Cir. 1927); *Dinan v. First National Bank of Detroit, supra.*

its intent to leave in effect the holding of the *Boston-Continental* cases as applied to national bank receiverships.

In addition, since the *Boston-Continental* cases Congress has amended the National Bank Act several times.[7] However, it made no amendment regarding the liability of a national bank's receiver for the unexpired term of a lease. This is another expression of Congress' approval of the *Boston-Continental* holdings.

The Decision Is Equitable.

The decision of the Court of Appeals does not create any unfair precedent for landlords. The decision is simply a matter of construction of this particular lease.

Petitioners participated in the formation of the lease; when the lease was executed, it was immediately assigned to petitioners. The *Boston-Continental* holdings had been in effect for over twenty-five years when this lease was made. Petitioners therefore had the opportunity to negotiate the language of the lease if they did not like its provisions regarding possible insolvency of the lessee.

Parties can in the future simply use different language to define the landlord's rights upon the insolvency of a national bank lessee. The decisions in this case and in the *Boston-Continental* cases do not bar landlords from preparing their leases to preserve a right to damages against the receiver of a national bank. The opinion in the *Kennedy* case stated that if the lease had provided that insolvency was a breach and without further action the lease would terminate and the lessor be entitled to damages, that claim would be binding against the bank's receiver.

We would finally note that petitioners have received their property back. And as contended by the petitioners, that

7. See Title 12, USCA.

property was improved from its condition at the beginning of the lease.

PETITIONERS' ARGUMENTS DO NOT SHOW ANY GROUND FOR THE PETITION

We will now reply to petitioners' arguments. We will show that they do not raise any issue to be decided by this Court.

Petitioners argue that FDIC had no power to disaffirm the lease and dispose of an "asset" of the bank. However, the cases are well settled that the receiver of a national bank does have the power to disaffirm leases. The Court of Appeals noted those cases in its opinion: *Kennedy v. Boston-Continental, supra; Boston-Continental v. Wendell Phillips, supra; Dinan v. First National Bank of Detroit, supra; Buhl Land Company v. Kavanaugh,* 131 F.Supp. 136 (E. D. Mich. 1954), affirmed 223 F.2d 265 (6th Cir. 1955); *Fidelity Safe Deposit & Trust Company v. Armstrong,* 35 Fed. 567 (C.C.S.D. Ohio 1888). Further, FDIC is not disposing of an "asset"; it is defending a claimed *liability.* Petitioners are not contributing money to the bank's estate; they are trying to take away $600,000 that will otherwise be distributed to depositors.

Petitioners next argue that the bank's insolvency and the receiver's disaffirmance breached the lease. The simple answer to this argument is that that is not what the lease says. Under the lease, petitioners were not entitled to liquidated damages until *they elected to terminate* the lease and reenter. Since they did not do so until long after insolvency and disaffirmance, their claim was not absolute and unconditional at the date of insolvency. And petitioners' argument is also answered by the *Boston-Continental* cases and *Dinan v. First National Bank of Detroit, supra.*

Petitioners imply[8] that there is some conflict in the circuits. However, there is no conflict. The cases cited by petitioners do not pertain to receiverships of national banks. National bank receiverships are governed by their own body of law,[9] and the cases dealing with national banks are consistent with the present decision.

Petitioners argue that the U. S. Supreme Court granted certiorari in the *Kennedy* case. We do not know the Court's reason for granting certiorari, or why the petition was abandoned. But regardless of what reason may have existed then, there is no reason now. The *Boston-Continental* decisions have stood for over thirty years. And as stated above, those decisions have received the approval of Congress in amendments which Congress has made to the Bankruptcy Act and the National Bank Act. And the Court of Appeals' opinion in this case noted the absence of recent decisions as an indication of the success of the measures taken to strengthen the banking system. Whatever reason may have existed for granting certiorari in 1936 does not exist today.

Petitioners make the bald assertion that it appears *without issue* that rent for the months of December 1964 and January 1965 was not paid.[10] The assertion is erroneous. Respondent affirmatively denied nonpayment on lines 3 and 4 of page 23 of its appellee's brief. Petitioners' authority for this assertion is an affidavit which has already been materially modified because of errors.[11] The error of petitioners' assertion is demonstrated by the letter which is set forth in full in the appendix to this brief. That letter,

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8. Page 13 of their petition.
9. See footnote 6, supra.
10. Petition, pp. 4, 14.
11. Tr., pp. 55-56.

acknowledging the December and January payments, was signed by the prior counsel for petitioners and should have been brought to the attention of their present counsel. Further, petitioners' complaint demonstrates both the error of the argument and that it is irrelevant to this action. The complaint did *not* seek any alleged unpaid rental for December or January. Instead, it sought only liquidated damages for the loss of anticipated rents during the unexpired term after July, 1965.

Finally, petitioners assert that there are some questions of fact. However, it is apparent that all of the material facts in the case are acknowledged: the making of the lease; the language of the lease; the insolvency of the bank; the disaffirmance of the lease by FDIC; and the later termination of the lease by petitioners. These are the only material facts, and they are uncontested.

The decision of the lower courts is simply the application of long-established law to those admitted facts.

CONCLUSION

The lower courts decided just one thing. That is, that under the provisions of this lease FDIC was as a matter of law not liable for the unexpired term of the lease.

The decision of the lower courts is correct. It is consistent with prior cases; it is consistent with the intent of Congress; it is based simply upon a construction of this particular lease; and it is equitable.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

Dated: July 24, 1968.
San Francisco, California

CHARLES A. LEGGE
BRONSON, BRONSON & MCKINNON
S. REX LEWIS
LESLIE H. FISHER

By CHARLES A. LEGGE
Attorneys for Respondent

(Appendix follows)

Appendix

HUSTED, PINNEY, SMITH & OGG
ATTORNEYS AT LAW
WELLS FARGO BANK BUILDING
2595 MISSION STREET
SAN FRANCISCO 10, CALIFORNIA
Mission 7-6644

R. L. HUSTED (1878-1954)
W. M. PINNEY, JR.
DONALD V. SMITH
ZACH L. OGG

BRANCH OFFICE
140 MONTGOMERY STREET

February 12, 1965

Charles A. Legge, Esq.
Bronson, Bronson & McKinnon
255 California Street
San Francisco, California

Re: Bank Premises - 220 Battery Street, S.F.
Our file No. 3397

Dear Mr. Legge:

This will confirm our telephone conversation of yesterday.

Both City Savings and Loan Association and Argonaut Savings and Loan Association agree that if the payments of the December rental and January rental were paid to Mr. Silverthorne either directly or by way of offset that neither of the Savings and Loan Associations have any claim for December rental and January rental.

We therefore renew the demand made in our letter of January 29, 1965 and request that the February rental be paid to City Savings and Loan Association at 140 Montgomery Street, San Francisco, California immediately.

All future rental payments should be sent to the same address.

We earnestly solicit your cooperation and early compliance with our request.

Very truly yours,

HUSTED, PINNEY, SMITH & OGG
2595 Mission Street
San Francisco 94110

W. M. PINNEY, JR.
For City Savings and Loan Assn.

Schumann, Payne & Clancy

Silas O. Payne

SILAS O. PAYNE
For Argonaut Savings and Loan Assn.

WMP/pc

cc: Melville B. Bennett, 260 California St., S.F., Calif.
Silas O. Payne, 400 Montgomery St., S.F., Calif.
City Savings and Loan Assn, 140 Montgomery St., S.F.
Argonaut Savings and Loan Assn., 165 Kearny St., S.F.

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OCTOBER TERM, 1968

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Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of San Francisco National Bank,

Respondent,

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOWARD B. CRITTENDEN, JR.
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PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF APPELLANTS ON PETITION FOR A WRIT OF CERTIORARI

The Respondent's brief (pg. 4) refers to the suit and claim at bar as one for the unexpired term of the lease. Such is not the nature of the suit. The complaint appears in full on pages 1 and 2 of the appendix to the petition. The material parts of the lease are set forth on pages 2-4.

Respondent's brief in the appendix sets forth a letter which is no part of the record in this case, and is contrary to the facts appearing in the record that no rent was paid under the lease for either the months of December 1964 or January of 1965, nor for the period after the receiver took possession on January 22, 1965, until March 2, 1965, when the February rent was paid a month late.

There was therefore a clear breach of the lease almost two months prior to the Comptroller closing the bank and this breach has continued. This default in payment of rent is not in issue in the record.

Respondent's brief correctly states that the lessor assigned the lease on the same day the lease was executed in 1963. The assignment of the lease is recited in paragraph 2 of the complaint and attached as Exhibit "B" to it in the complete record before this court. As such, no payment to the assignor after the notice of the assignment was given could be a credit nor could there be any offset against the assignor. The fact is and Exhibit "B" to the complaint shows that the bank consented in writing to the assignment and therefore had notice.

Respondent's brief cites and relies upon three cases, each of which certiorari has been granted by this court and in each case the petitioner dismissed voluntarily before there was a decision by the United States Supreme Court.

I

Three Cases in Which Certiorari Has Been Granted, Involving the Principal Question in This Petition.

The first case is that of *Kennedy v. Boston-Continental National Bank*, reported in 84 Fed.2d 592, in which certiorari was granted at 299 U.S. 533, and dis-

missed on motion of the petitioner's counsel in 300 U.S. 694. This petition appears in this court's records, No. 381 of October Term, 1936.

The petition for certiorari, filed September 21, 1936, in the Kennedy case states that there was a fifteen year lease at $12,000 a year in effect to the lessee national bank who defaulted in the covenant of rent on December 1, 1931. The bank ceased business on December 16, 1931, and the Comptroller took over on December 17th. Demand was made on January 8, 1932, giving notice of default and on January 13th the receiver notified the lessor of his election not to assume the lease. On August 18, 1932, the lessor made re-entry and declared the lease terminated under its terms and subsequently a claim was filed under the liquidated damage provisions of the lease which was allowed by the district court and reversed by the circuit court of appeals under the *Manhattan Property v. Irving Trust Co.* bankruptcy rule (291 U.S. 320). J. Morton dissented as the claim was under *Wm. Filene Sons Co. v. Weed* equity rule (245 U.S. 597). This petition in the Kennedy case sets forth the reason for the writ as the provability of the claim of a landlord for liquidated damage and the rule adopted by the C.C.A. was in conflict with the *Wm. Filene Sons* case (245 U.S. 597). This petition points out that the bankruptcy laws are not applicable to liquidation of national banks, citing *Cook County National Bank v. United States*, 107 U.S. 445; and *Gamble v. Wimberly*, 44 Fed.2d 329. While the National Bank Act is an exclusive method for liquidation of national banks, it merely lays down general rules for winding up affairs, and does not, as the Bankruptcy Act, establish a complete system of rules governing all phases of liquidation. The petition points out that this court has consistently applied the general principles

of equity for insolvent estates in national bank insolvencies and points out that Congress did not intend by the National Bank Act to impinge on contracts between creditors or debtors, or to destroy by implication any vested right at the time of suspension of the national bank; that all rights, legal or equitable, existing at the time of insolvency are preserved; and liens, equities or rights arising by express agreement or implication by nature of the dealings, were not to be invalidated.

The Kennedy petition for certiorari states that the National Bank Act contains no provision defining proveable claims or requiring that claims must have accrued and become unconditionally fixed on or before the time the bank became insolvent. *Sections 193* and *194* provide for the presentation of claims and the payment of dividends in the broadest terms known to the law and is entirely unrestricted. This petition cites *Merrill v. National Bank*, 173 U.S. 131 and at 134 quotes:

> "The requirement of equality of distribution among creditors by the national banking act involves no invasion of *prior contract rights* or any such creditors, and ought not to be construed as having or being intended to have, such a result." (italics ours)

The petition points out that the application of equitable principals requires the allowance of the landlord's claim for liquidated damages, citing the *Filene Sons* case, 245 U.S. 597, and pointing out the factual similarity between the two cases, and noting that the only difference was that the *Filene* case involved an equity bill for receivership while the *Kennedy* case involved a national bank under the Comptroller of the Currency. It points out that the *Filene Sons* decision was reversed by the

Supreme Court holding that for an insolvent estate in an equity receivership, there was no warrant to exclude creditors or introduce supposed equities other than those determined by contract between the creditors and the debtor; and that the creditor had a reasonable time before distribution is made to make his lawful claim and that the claim was proveable and held perfected by the re-entry and the terminating of the lease after the bill was filed, but damages were not presently payable until the re-entry. This *Kennedy* case petition points out that the breach occurred prior to the receivership (the rent being in default for seventeen days prior to the Comptroller's action) and that the lessor had a definite and contractual right based upon a contract made before the Comptroller took possession; that the lessor had at the time of the receivership an unquestioned right arising by express agreement, prior to insolvency, and not in contemplation thereof. The petition points out that the measure of damages was set forth in contract and its ultimate determination gave the claim its value on the date of insolvency and that this was a claim within the terms of the National Bank Act which cannot be taken away. (See *Chem. Nat'l. Bank v. Hartford Deposit Co.*, 161 U.S. 1.)

Respondent's brief cites and relies upon the case of *Boston-Continental National Bank v. Wendell Phillips Co.*, 84 Fed.2d 599, in which certiorari was granted by this court in *299 U.S. 533*, and the case was dismissed on motion of the petitioner's counsel at *300 U.S. 684*.

The petition for certiorari, upon which the writ was granted, appears in the record of case No. 382 of October 1936 term and it states that there was a ten year lease made to the bank and during the lease on December 17, 1931, the Comptroller closed the bank and on January 13, 1932, the receiver elected not to adopt

the lease. On March 30, 1932, the lessee vacated and the landlord on the same day terminated the lease which contained a covenant of indemnity for loss measured by the difference between the lease rental and the rental value for the balance of the term. This petition states that the question is whether the bankruptcy rule or the equitable rule shall apply to liquidation of national banks. It cites *12 U.S.C. 191-4*, the National Banking Act, as constituting a complete and statutory system for liquidation of national banks and distribution of assets. The petition points out that any provision for dividing claims into classes and cutting off contractual rights must be found in the statute itself. The petition states that neither the Bankrupcy Act nor the rules thereunder nor general statutory provisions giving the U.S. Government priorities in insolvency nor does state statutes classifying claims in insolvency proceedings are effective in national bank rceiverships, citing *Merrill v. Nat'l. Bank of Jacksonville*, 173 U.S. 131; *Cook Co. Nat'l. Bank v. U.S.*, 107 U.S. 445; and *Davis v. Elmira Savings Bank*, 161 U.S. 275. The National Bank Act contains no provisions defining claims that may presented or specifying contractual rights that are to be excluded from participating in the distribution of assets. *Section 194* provides for rateable distribution of money on all claims proved to the satisfaction of the Comptroller or adjudicated by a competent court. This means no creditor shall benefit at the expense of other creditors. The petition points out that in the lease the bank agreed by a distinct covenant not predicated on the leasehold, to pay damages in certain events. While it is true re-entry was made after insolvency, the contractual right to damages was a personal covenant, upon a footing that was familiar and fair. If the rateable dividend provision

is construed to cut off the landlord's pre-existing rights, the other creditors will benefit at the expense of the landlord whose rights are determined by the contract that the bank was content to make and the landlord to accept. The petition in the *Wendell Phillips* case points out that the court has construed the National Bank Act that it shall be administered in accordance with rules in equity, citing *Scott v. Armstrong*, 146 U.S. 499, and *Merrill v. Nat'l. Bank*, 173 U.S. 131, and that the circuit court of appeals by applying the bankruptcy rules disregarded these two decisions, the *Merrill* case and the *Scott* case.

Respondent's brief cites and relies upon *Dinan v. First National Bank*, 117 Fed.2d. 459. In this case certiorari was granted by the United States Supreme Court in 314 U.S. 593, and the case was dismissed on motion of petitioner's counsel in 315 U.S. 825. The petition in the *Dinan* case is in this court's records as Case No. 277 in the October term 1941 and states that the fundamental issue is whether the lessor has a right to establish his claim for damages for anticipatory breach of a lease by a national bank which had defaulted under its lease prior to the declaration of insolvency or the appointment of a conservator or receiver. It points out that Michigan creates a cause of action for damages very similar to that of California and which is set forth in *California Civil Code Section 3308* (pgs. 6 and 7, appendix). The *Dinan* petition points out that there was a liquidated damage provision in that bank lease very similar to the covenant of the lease, in the case at bar, set forth in petitioner's appendix, page 4. The *Dinan* petition raises the question that where the state law creates a cause of action for damages does the National Bank Act annul this cause of action in disregard of the state law? It raises a further question,

assuming that the National Bank Act is controlling, is there anything in that Act which in any way negates the right of the lessor to establish his claim in common with other creditors for breach of the lease? The *Dinan* petition also raises a third question, assuming the rule to be, as asserted by the court below, that the lessor's claim must exist at the time of appointment of the receiver, does a subsequent declaration of insolvency or appointment of a receiver operate as a bar to the already existing claim of the lessor so as to prevent him from sharing with other creditors of the bank? The *Dinan* petition sets forth a lease to the bank of $800 per month in which the rental last paid on February 1st and the payment due on March 1st was not paid. The bank closed with the bank holiday declared by the Governor and later by the President's bank holiday proclamation and did not re-open. Then on April 26th the conservator elected not to take possession and the Comptroller declared the bank insolvent on May 11th.

The *Dinan* petition cites the rule of *White v. Knox*, 111 U.S. 784, that the business of the bank must stop when the bank is declared insolvent by the Comptroller and that therefore no new debts can be contracted after that date and only a claim that originated in something done before the insolvency was a proper claim. The *Dinan* petition points out that in that case (as in the case at bar), there was a default in payment of rent antedating the declaration of insolvency and that the corporation still continued to exist and that Michigan by its law permits the lessor to recover damages upon the breach of the lease and that this is not in conflict with the federal rule, reciting *Chem. Nat'l. Bank v. Hartford Deposit Co.*, 161 U.S. 1; and *Int'l. Tr. Co. v. Weeks*, 203 U.S. 364. It is pointed out that the default of the lessee created a vested cause of action for

damages and arose out of an anticipatory breach. This petition points out there was nothing in the National Bank Act which prevents accrual of cause of action under local law by reason of the action of the bank prior to declaration of insolvency and the appointment of the receiver. That in the *Dinan* matter, the breach occurred by the failure to pay rent on March 1st and that the actual insolvency was declared by the Comptroller in May and that the landlord was entitled under Michigan law to recovery called for under application of the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64. This was a vested cause of action under Michigan law for damages for anticipatory breach and there is nothing in the National Bank Act, express or implied, which prevents action application of the *Erie Railroad* case. The *Dinan* petition points out that the breach of the lease by the bank preceeded the declaration of insolvency and the appointment of the receiver and that the subsequent declaration of insolvency did not relate back to the original closing of the bank by the Governor in February and cites and quotes from *Chem. Nat'l. Bank v. Hartford Deposit Co.*, 161 U.S. 1.

> "When insolvency is *declared* the corporation is incapacited from doing any new business. It has ceased to be a going firm, but it still survives for the purpose of the discharge of its liabilities and the final distribution of its remaining assets when that has been accomplished."

In the *Dinan* case, counsel for the Comptroller filed a reply brief and the petitioners filed their reply brief pointing out that the National Bank Act provided a comprehensive system for claims and for liquidation of closed banks, but nothing in it nullifies a cause of action arising under state law as a result of a breach of the lease or in contract or in tort committed prior to

Comptroller's declaration of insolvency and assumption of control. It points out that the right to share in distribution still exists, that the corporate entity still exists and that the bank is not released and the landlord's claim is enforceable against the assets of the bank.

We therefore have three decisions, and the principal three relied upon by the respondents, which in each case involved the same problems in this matter as the case at bar and in which certiorari was granted. In each of them the petitioners voluntarily dismissed the case, thus denying us the benefit of this court's decision of this important point of law.

It is interesting to note that in each of the three cases, the petitions cited *Chem. National Bank v. Hartford Deposit Co.*, 161 U.S. 1, where the Supreme Court upheld recovery on a lease where a national bank did go into receivership. In that case there was a re-entry by the landlord after the receiver was appointed and the Supreme Court held that the lessor was entitled to recover.

Respondent's brief cites *Buhl Land Company v. Kavanaugh*, 131 Fed. Supp. 136, as one of several cases having in them examples where the court has upheld the power of a receiver of a statutory national bank to disaffirm a lease and to lose the assets of a substantial amount without the approval of the court. We have reviewed the *Kennedy* case recited by respondent on page 7 and we have reviewed the *Wendell Phillips* case also cited, and also the *Dinan* case. The *Buhl Land Co.* case involved a suit for taxes claimed to be wrongfully assessed upon income of the plaintiff. The lessor had leased a building to a national bank that became insolvent and subsequently the taxpayer recovered $68,750 for future rents from the receiver, evidently under a liquidated damage clause as in the case at bar. The ques-

tion of taxation arose because the lessor had accrued the rents that he had not received for several years after the bank closed and during the pending litigation. The court held that as to these rents accrued and unpaid and in litigation they were not certain and therefore not includable in the landlord's income as accrued income and taxable as income until received.

Respondent's brief also cites *Fidelity Safe Deposit & Trust Company v. Armstrong*, 35 Fed. 567, decided by the circuit court in the Southern District of Ohio in 1888. It involved a lease to a bank in which the Comptroller obtained a decree cancelling the charter of the bank. The decision points out that with the bank no longer existing there was no lessee to sue and that the receiver took possession at a reduced rental.

We submit none of these authorities involve nor do they decide that a statutory receiver of a national bank has any power to dispose of assets of the bank, particularly by abandoning them and repudiating and further breaching a valid contract as in the case of the leasehold and leasehold improvements in the case at bar without consent of any court first had and obtained or without sale of the assets for a valuable consideration.

Nowhere in the National Bank Act or in any decision is there power given to the statutory receiver to breach valid and existing contracts in existence at the time the bank is declared insolvent nor to give away assets nor lose them or to prefer some creditors over others nor create classes of creditors nor to destroy vested rights existing by contract at the time of insolvency. Certainly the Comptroller or his statutory receiver has no right to invalidate vested contract rights.

II

Petitioner's Showing for Grounds for the Writ.

1. The circuit court decision where certiorari is asked, turns upon the *Kennedy* case, 84 Fed.2d 592, in which certiorari was granted. It also turned on the *Wendell Phillips* case, 64 Fed.2d 599, in which certiorari was granted. It cites the *Dinan* case in support of its holding, another decision in which certiorari was also granted.

2. All three of these cases involve the same issue, whether a liquidated damage clause in a lease is enforceable by the landlord against the assets of the bank, upon a contract made long prior to the declaration of insolvency or the appointment of a statutory receiver.

3. This decision of the 9th Circuit Court of Appeals is contrary to the *Wm. Filene Sons Co. v. Weed*, 245 U.S. 597, and *Gardner v. Butler & Co.*, 245 U.S. 603. A claim for damages by the landlord for breach of the lease was upheld in *Chem. Nat'l. Bank v. Hartford Deposit Co.*, 161 U.S. 1. The claim for damages under a valid lease accruing after the appointment of a judicial receiver is proveable in the receivership if it is liquidated before distributon of the assets by a judgment for damages, *Dickinson v. Universal Service Stations*, 9 Cir., 100 Fed.2d 753.

4. Executory contracts are breached by insolvency of a promisor under the doctrine of anticipatory breach, *Central Trust Co. v. Chicago Auditorium Theatre*, 240 U.S. 581; and anticipatory breaches are recognized in California law. *Caminetti v. Manierre*, 23 Cal.2d 94. See also *Leo v. Pearce Stores*, 54 Fed.2d 92, and cases therein cited.

In the case at bar the lease was breached by default in rent commencing December 1, 1964, almost two

months before the Comptroller closed the bank and appointed the statutory receiver. This breach has continued and no rent has been paid for January 1965 as well. The lease is to the San Francisco National Bank for general banking, trust and safe deposit purposes only (Par. 6 of lease, appendix pg. 3). The bank disabled itself and committed an anticipatory breach within *Central Tr. Co. v. Chicago Aud. Theatre* case (240 U.S. 581) by becoming insolvent and its financial affairs such that the Comptroller terminated this banking business.

5. *Manhattan Prop. v. Irving Tr.*, 291 U.S. 320, is not only a bankruptcy case not national bank or equitable insolvency case but one involving a covenant of indemnity as distinguished from a liquidated damage clause. (See Par. 15c of lease, appendix pg. 4, and Calif. *CC 3308*, app. pg. 6-7). The reasoning of the *Manhattan* case is that with a covenant of indemnity, a new cause of action arises only upon the breach to be indemnified and re-entry as distinguished from the liquidated damage clause which is a personal covenant created when the lease was contracted. This distinction is drawn and discussed in *Dickinson v. Universal Ser. Stations*, 9 Cir., 100 Fed.2d 753, granting recovery upon a lease involved in a judicial receivership.

6. The affidavits on summary judgment in the record in this case show that no rent was paid during December or during January, a total of $6,000. The court in face of this showing that there was a right to recover $6,000, etc., and a breach of the lease prior to the statutory receivership, erroneously granted summary judgment.

7. The statutory receiver appointed by the Comptroller for an insolvent national bank does not have the power to dispose of assets except in accordance

with the statute. He cannot breach contracts. He cannot lose the assets of the bank. He cannot repudiate a valid contract the bank was content to make and the lessor consented to.

We have not considered the effect of this court's granting of three writs of certiorari upon the doctrine of stare decisis and the weight to be given to those decisions cited in the circuit court of appeals' decision. We think that the fact certiorari has been granted on three separate occasions, and in each the plaintiff has dismissed the case before we have had the advantage of a decision, tends to show that there is a good reason to believe that the rule of law common in all three cases is subject to re-examination. It might be safely said that the fact the United States Supreme Court grants a petition for certiorari on three separate occasions in three separate cases all having the same question of law that there is a compelling reason to believe that four of the Justices in each occasion believed there was sufficient question of a sufficiently important problem to merit the consideration in each of the cases by this court. The fact that Congress has not seen fit to legislate on this point since any of these three cases that involved certiorari were decided would only tend to corroborate the view that the point of law is not yet established as claimed by respondent. It is still the law of the *Filene Sons* case, supra, *First National Bank of Chicago*, supra, etc., though somewhat in confusion by the decisions in which certiorari was granted, and now by the 9th Circuit decision for which this petition is pending.

Respondent contends that the decision of the 9th Circuit Court of Appeals is equitable. Any counsel having a decision of any court in his favor is, of course, inclined to believe that he has had justice for his client,

as he got what his client asked for. It is certainly not justice or equitable to take a contract which the bank saw fit to make and for the lessor to accept and to completely breach it and then obliterate the contractual rights. It is not fair or equitable to divide creditors into classes and to disregard one class of creditors and to distribute the bank's assets among another class of creditors, thus enriching one class unjustly instead of paying pro-rata as the bank statute requires. It is not equitable to grant the remedy in an equity receivership as in the *Wm. Filene* case, 245 U.S. 597, but to deny the same remedies in a statutory receivership of a national bank under the same factual situation when equitable principals are uniformly applied in bank insolvency proceedings. It is not equitable or fair to bar the plaintiffs by a dismissal with prejudice upon a motion for summary judgment when the affidavits show that there is unpaid and in default $6,000 in rent, all of which accrued prior to the Comptroller closing the bank or appointing his statutory receiver. It is not equitable or fair or even common sense to permit a statutory receiver to breach a valid and existing contract in existence long prior to the closing of the bank and to permit this statutory receiver to lose extensive property and leasehold improvements and to force upon a lessor the breach of his lease and the surrender of premises materially altered and far less valuable by reason of the alteration and integration into another building.

CONCLUSIONS

The questions raised by this case merit consid
tion by a writ of certiorari. We ask the writ issue

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